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In the Supreme Court of the United States

OCTOBER TERM, 1978

COUNCIL FOR EMPLOYMENT AND ECONOMIC ENERGY USE, PETITIONER

v.

WHDH CORPORATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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This brief is filed in response to the Court's invitation of November 27, 1978.

QUESTION PRESENTED[1]

Whether petitioner's allegation that its ability to influence the electorate was diminished by four radio broadcasters' joint decision to provide free air time to a group that opposed petitioner's views states a claim under Section 1 of the Sherman Act.

STATEMENT

Petitioner was organized to campaign against a proposition placed on the Massachusetts ballot in

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[1]Petitioner presents a number of other questions (Pet. 2), which involve no issue of general importance. We therefore do not address them.

November 1976 (Pet. App. 2, 4).[2] As part of its efforts to defeat that proposition, petitioner purchased air time on radio stations owned or operated by respondents.

Petitioner alleges that respondents agreed to give Fair Share, Inc., a political organization that favored the proposition, one free advertising space for every two that petitioner purchased (Pet. App. 2 n.2, 4). Petitioner alleges that this agreement "denied [it] the opportunity to seek a ratio [of advertising time] which would have provided better value for its radio advertising expenditures" (Pet. 16), and, therefore, that it was denied "its consumer right to a freely competitive market place when purchasing broadcast advertising time" (Pet. 25).

On October 26, 1976, petitioner lodged a complaint with the Federal Communications Commission, asking the FCC to review the radio stations' determinations to provide its opponent free radio time. The FCC denied relief, and the court of appeals affirmed the Commission's decision that the broadcasters acted reasonably in discharging their "fairness doctrine" responsibilities.[3] In the meantime petitioner filed the instant suit, contending that the broadcasters' agreement violated Section 1 of the Sherman Act, 15 U.S.C 1. The district court dismissed petitioner's complaint for failure to state a claim (Pet. App.),[4] and the court of appeals affirmed (Pet. App. 1-8). The court of appeals concluded that the agreement alleged in this case related to political rather than economic activity and thus was not within the scope of the Sherman Act (Pet. App. 5-7).

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[2]The pages in the appendix to the petition are not numbered. We therefore use the number of the page of the court of appeals' opinion.

[3]*Council for Employment and Economic Energy Use* v. *FCC*, 575 F. 2d 311 (1st Cir.), cert. denied, No. 78-189 (Oct. 16, 1978).

[4]The order of dismissal was entered only after petitioner had failed, after three extensions of time, to file a brief in opposition to respondents' motion to dismiss. See Pet. App. 2-3.

DISCUSSION

1. Petitioner suggests (Pet. 12) that the court of appeals held that the FCC's Fairness Doctrine, which requires broadcasters to inform the public of competing views on controversial issues of public importance, once it gives time to one view, precluded antitrust liability in the circumstances of this case. Petitioner further contends (Pet. 21) that such antitrust immunity is unwarranted because the Fairness Doctrine does not require broadcasters to decide in concert how they will fulfill their obligations under the doctrine. We agree with petitioner that the Fairness Doctrine does not extend antitrust immunity to an agreement of the sort alleged here, but the court of appeals did not hold or suggest that the alleged agreement in question was exempt from antitrust liability by virtue of the Fairness Doctrine. The court's passing reference to the doctrine was in a wholly different context. After observing that *California Motor Transport Co.* v. *Trucking Unlimited*, 404 U.S. 508, 515 (1972), held that a combination of entrepreneurs to harass and deter their commercial competitors from having free and unlimited access to the courts might state a claim under Section 1 of the Sherman Act, the court of appeals simply stated that an agreement to provide petitioner's political opponents with free time did not deprive petitioner of access to the broadcast time it desired (Pet. App. 7). Petitioner's suggestion that the court intended to exempt respondents from antitrust liability because of the existence of the Fairness Doctrine thus is incorrect. This case does not present any issue concerning the relationship between the antitrust laws and the Fairness Doctrine.

2. The court of appeals held that the complaint states no claim under Section 1 of the Sherman Act because the dispute between petitioner and Fair Share, Inc., was fundamentally political rather than commercial (Pet. App.

6-7). Concerted action in such political disputes, the court held, is exempt from liability under the *Noerr-Pennington* doctrine.[5]

We also believe that petitioner has not stated a claim under Section 1, although we see no reason to delineate the scope of the *Noerr-Pennington* doctrine in cases, such as this one, in which the alleged conspiracy is unrelated to the political goals sought to be achieved.[6] We submit that petitioner's case fails at the threshold because it has not suffered any of the kinds of injury that the antitrust laws are intended to prevent.

Recovery of damages in private antitrust actions under Section 1 requires proof, among other things, of an agreement that (1) unreasonably restricts competition and (2) causes injury to the "business or property" of the plaintiff within the meaning of Section 4 of the Clayton Act, 15 U.S.C. 15. Even where these prerequisites are met, however, recovery is not permitted in all circumstances. There can be no recovery where the damage to business or property bears no relationship to the antitrust reasons for forbidding the conduct.[7] But in the present case petitioner

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[5] *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers of America* v. *Pennington*, 381 U.S. 657 (1965); *California Motor Transport Co.* v. *Trucking Unlimited, supra*, 404 U.S. at 513-514. See also *Apex Hosiery Co.* v. *Leader*, 310 U.S. 469, 493, 495 (1940).

[6] The conspiracy alleged here had nothing to do with the political objectives of respondents. In the *Noerr-Pennington* line of cases, by contrast, the conspirators were attempting to achieve their own political or commercial advantage by acting in concert to influence legislators, courts or agencies.

[7] *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977).

has suffered no injury to its "business or property."[8] The only injury suffered by petitioner is the possible reduction in the likelihood that its ideas will find acceptance. There may be a marketplace of ideas, but that marketplace is not governed by the Sherman Act.

The words "business or property" in Section 4 comprehend economic interests, not political interests. This is evident from the plain language of the phrase. It is also evident from the purpose of Section 4. The Sherman Act is intended to prohibit unreasonable restraints of *commerce, i.e.*, the sale and purchase of goods and services. Section 4, in turn, was intended to allow compensation for the monetary injuries resulting from restraints on commerce. *Hawaii* v. *Standard Oil Co.*, 405 U.S. 251, 264-265 (1972).[9] Although the *Noerr-Pennington* doctrine permits recovery for economic injury

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[8] Compare Section 16 of the Clayton Act, 15 U.S.C. 26, which authorizes injunctions to prevent threatened "loss or damage" as a violation of the antitrust laws. Whether political injury may constitute such "loss or damage" within the meaning of Section 16 is not presented by this petition. The issue was neither briefed nor argued in the court of appeals (Br. in Opp. 13) nor decided by the court of appeals (Pet. App. 3 n.5).

[9] In *Hawaii* the Court said that a state's general interest in its economy is neither business nor property. 405 U.S. at 264-265. "Property" is not limited to business interests. *Chattanooga Foundry & Pipe Works* v. *City of Atlanta*, 203 U.S. 390, 396 (1906). We have argued as *amicus curiae* in *Reiter* v. *Sonotone Corp.*, No. 78-690, cert. granted (Jan. 8, 1979), that consumers who have paid higher prices for goods or services as a result of antitrust violations are injured in their "property" within the meaning of Section 4. For a discussion of the categories of economic injuries that have been included or excluded from the phrase "business or property," see P. Areeda & D. Turner, *Antitrust Law* paras. 334b, 334f, 337-346 (1978).

resulting from anticompetitive combinations engaged in sham political activities, the Court has never permitted antitrust recovery for injury to a speech or political interest. Because injury to speech and political interests generally is so far removed from the economic and commercial interests the antitrust laws are designed to protect, we submit that the statutory terms "business or property" should not be strained to encompass a diminution in one's power to persuade others, absent clearer evidence of such a congressional intent. *Hawaii*, *supra*, 405 U.S. at 264.

Petitioner's injury was to the political value of its speech, not to any of its commericial interests. Respondents did not fix the price petitioner paid for for broadcast time or limit the time petitioner might purchase. Such activities would have affected the price or the supply of a service or product desired by petitioner and thereby injured petitioner's business or property. But respondents' agreement to broadcast a viewpoint different from petitioner's could have injured petitioner, if at all, only by rendering petitioner's political message less creditable. The appeal of the content of such messages is not "business or property," and a diminution in their effectiveness thus does not amount to antitrust injury.

Petitioner's position is not improved by contending (Pet. 18-19) that it desired to purchase not merely air time but also a "ratio" of its own air time to the time allocated to the opposing viewpoint. At most, this amounts to a claim (i) that petitioner desired to negotiate, as part of its purchase of broadcast time, restrictions on the amount of free time (exceeding the minimum required by the Fairness Doctrine) that respondents would make available to political opponents, and (ii) that the respondents agreed to refuse to negotiate with petitioner on this

basis.[10] This, however, does not alter the fact that petitioner remained free to purchase all of the air time it desired at whatever price it could negotiate. Respondents did not agree not to bargain about price. Since the only benefit to petitioner from an arrangement limiting the time available to petitioner's opponents would have been an arguable increase in the effectiveness of petitioner's message, the refusal of respondents to offer such an arrangement results in no injury to petitioner's business or property. The complaint was properly dismissed.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[10]The complaint does not actually state such a theory, but it may be fairly comprehended within the allegations of the complaint. Cf. *Conley* v. *Gibson*, 355 U.S. 41, 45-46 (1957).

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